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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20-4-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

A.S. No.60 of 1992

1. Precision Controls,
Partnership firm by its
Partner S.Sankar,
5-A, Desilva Road,
Mylapore, Madras-4.

2. S.Sankar

.. Appellants

vs.

1. Tubes Investments of India Limited,
Madras-1.

2. S.Sridhar

.. Respondents

Appeal Suit against the judgment and decree dated 30.3.1990 made in O.S. No.7246 of 1983 on the file of the VIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.Aravind

For Respondent-1 : Mr.V.R.Janarthanam

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JUDGMENT

The appellants are the defendants 1 and 2 and the 3rd defendant is the second respondent herein in the suit in O.S.No.7246 of 1983 on the file of the VIII Assistant Judge, City Civil Court, Chennai. The appellants have preferred this appeal as against the judgment and decree of the court below dated 30.3.1990.



2. The first respondent/plaintiff filed the suit for recovery of Rs.40,205/- with interest thereon at 12% p.a. from the appellants and the second respondent herein on the basis of the contract entered into between the first respondent on the one hand and the appellants as well as the 3rd respondent on the other for the supply, erection and commissioning of one Rotating and Tilting type Electrically Heated carbonitriding Furnace as per the specifications and description, on the terms and conditions and other details set out in the purchase order of the first respondent/plaintiff bearing No.20/0504/2607 dated 18.3.1982.

3. The appellants resisted the suit by filing a written statement through the first appellant and adopted by the second appellant and the second respondent herein. The court below having considered the oral and documentary evidence adduced on either side had ultimately decreed the suit as prayed for with costs. Hence, the appeal.

4. The contentions of the first respondent/plaintiff in the plaint are briefly stated as follows:-

(a) The first defendant is a partnership firm carrying on the business of manufacturing and supply of precision control machinery. The second and third defendants are partners of the first defendant firm.

(b) The first plaintiff is manufacturing cycles under the name and style "T.I. Cycles" and factory is situate at Ambattur. The first defendant's factory is also situate at Industrial Estate, Ambattur. The plaintiff placed an order with the second defendant for the supply, erection and commissioning of one Rotating and Tilting type Electrically Heated carbonitriding Furnace as per the specifications and description on the terms and conditions in the purchase order of the plaintiff bearing No.20/0504/2607 dated 18.3.1982

(c) It was agreed between the plaintiff and the defendants among other terms and conditions that (i) the Furnace should be supplied, erected and commissioned by the defendants by not later than 9th July, 1982; (ii) the price payable was Rs.1,87,000/- Ex-works T.I. Cycles of India; (iii) 20% advance has to be paid by the plaintiff upon submission of guarantee from one of the Nationalised General Insurance companies by the defendants; (iv) 80% of the price to be paid against Industrial Development Bank of India Bill rediscounting Scheme (5 years); (v) the defendants should repay 10% of the cost of Furnace at the time of receiving the said Industrial Development Bank of India documents to the plaintiff as retention amount payable to the defendants after six months on successful commissioning of the furnace; (vi) a penalty amount calculated at 0.5% of the price will be



levied for each weeks delay in the supply of the furnace; (vii) it was further agreed that any dispute between the parties arising out of the said agreement would be subject to the jurisdiction of the courts at Madras.

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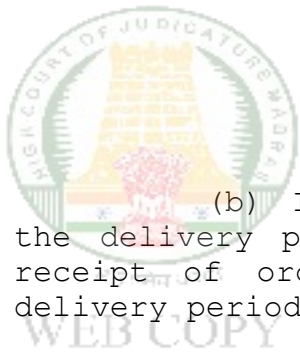
(d) By letter dated 20.3.1982 the first defendant firm also confirmed their acceptance of the said order as per the terms and conditions set out therein. The plaintiff also paid to the defendants Rs.37,400/- by cheque dated 23.3.1982 as advance and the defendants acknowledged the same by their stamped receipt dated 23.3.1982. In spite of repeated enquiries and reminders of the plaintiff, the defendants failed to supply the said furnace as agreed on or before 9.7.1982 pleading some excuse or other, but they supplied the furnace on 15.12.1982 after a delay of 23 weeks thereby causing the plaintiff much loss and hardship in making alternative arrangements.

(e) Further on the supply of the said furnace, when the plaintiff paid the balance of price payable and delivered the I.D.B.I. documents aforementioned, the defendants failed to pay the plaintiff as per the terms of the said agreement 10% of the said price, i.e., Rs.18,700/- which the plaintiff was entitled as retention money. Further the defendants became liable to make good the loss and damages suffered by the plaintiff, which was stipulated at 0.5% on the value of sale price, for 23 weeks which is quantified at Rs.21,505/-. The second and third defendants as partners of the first defendant are also personally liable to pay the said amounts.

(f) By notice dated 4.2.1983, the defendants were called upon to pay the aforesaid mentioned amount totally a sum of Rs.40,205/- and the defendants having received the same, failed to comply with the demand. However the defendant sent the letter dated 14.2.1983 without any reference to the notice issued by the plaintiff and have denied their liability on the allegations which are not tenable. For that, the plaintiff has also sent a rejoinder to the same repudiating their contention. Hence the suit.

5. The averments in the written statement filed by the appellants as well as the second respondent herein are briefly as follows:-

(a) It is true that the plaintiff placed an order on 18.3.1982 with the defendants agreed for the supply, erection and commissioning of one Rotating and Tilting type Electrically Heated carbonitriding Furnace. It is admitted that by letter dated 20.3.1982, the first defendant-firm confirmed their acceptance of the order, but it is denied that the details set out in the purchase order were agreed to between the parties as alleged. Further, the insurance guarantee was not agreed to and instead of which an indemnity bond was given.



(b) In the defendant's letter No.PC:TN:82 dated 2.3.1982, the delivery period was given as 15 to 18 weeks from the date of receipt of order. Even in the plaintiff's purchase order, the delivery period has been mentioned as under:-

"complete plant and equipment will be supplied within 16 weeks from the date of placement of the order, a period of two weeks will be allowed for erection and commissioning of the furnace."

Hence the contention that the furnace should be supplied, erected and commissioned by 9.7.1982 is incorrect.

(c) The defendants supplied the furnace on 14.12.1982. but it is denied that the delay of 23 weeks was caused. In fact only around 10 weeks' delay was caused due to circumstances beyond the control of the defendants. The order had been accepted subject to Force Majeure Clause as per the general conditions of sales attached along with the defendant's offer. The labour unrest and strikes prevailed in the defendants' factory had been communicated to the plaintiff in letter No.PC:WO:3993:82 dated 16.4.1982 and was also personally inspected by the representatives of the plaintiff when they came to the factory during that period.

(d) The plaintiff had also contributed to the delay by three weeks as the drawing of the equipment sent by the defendants on 16.4.1982 had been approved by the plaintiff only on 6.5.1982 and the same is received by the defendants on 10.5.1982. Further the technical defects encountered by the defendants beyond their control were to be tackled so as to complete the furnace with specific reference to the position of the "Retort" forming part of the material. It was approved by the plaintiff only on 13.10.1982 and confirmed later on 22.10.1982 as they have stated that they needed the furnace along with the "Retort" and not otherwise. Therefore the delay in delivery was acceptable to the plaintiff. Further, the various alterations were suggested by the technical personnel of the plaintiff as per their letter dated 2.11.1983 after the preliminary inspection.

(e) It is denied that 10% retention money has to be paid by the defendants to the plaintiff since the Managing Director of the defendants had a discussion with the General Manager of the plaintiff who confirmed to waive the retention money in view of the explanation given for the delay in delivering the equipment. The equipment was inspected by the senior officials of the plaintiff in the defendants' factory site and clearance was given without insisting on any retention money. In the meeting held on 14.12.1982 both the parties agreed the same and recorded minutes of the meeting.



(f) Therefore the defendants have not caused any wilful delay nor liable to pay any damages to the plaintiff. Hence, the suit may be dismissed.

6. On the above pleadings, the following issues were framed for trial:-

(1) Whether the plaintiff is entitled to the suit claim as prayed for?

(2) Whether the defendant is liable to pay the amount as prayed for in the suit?

(3) To what relief the plaintiff is entitled?

7. The first respondent as plaintiff in the suit examined one witness and produced the documents under Exs.A-1 to A-30. On the side of the appellants/defendants, one witness was examined and one document was marked as Ex.B-1. After analysing the evidence on record and upon hearing the arguments advanced on either side, learned 18th Assistant Judge, City Civil Court, Chennai found on the said issues that the first respondent is entitled to the suit claim from the appellants and therefore decreed the suit as prayed for with costs.

8. Heard Mr.Aravind, learned counsel appearing for the appellants and Mr.V.C.Janarthanam, learned counsel appearing for the first respondent.

9. Learned counsel for the appellants has submitted the following contentions on behalf of the appellants:-

(a) The court below erred in decreeing the suit as prayed for without considering the full and final settlement of the claim between the parties under Ex.B-1 dated 14.12.1982. Similarly, the court below failed to note that after due inspection by the plaintiff and after delivery of the equipment to the plaintiff on 14.12.1982, the balance payment of 80% of the purchase money was made by the plaintiff and the I.D.B.I. documents were duly handed over to the defendants, as per the minutes of the meeting held on 14.12.1982 (vide) Ex.B-1. The reasoning of the learned Judge for not accepting Ex.B-1 is erroneous.

(b) Similarly, several circumstances which would show that the delay in supplying the equipment was not due to the defendants' fault, but it is due to the alteration made by the plaintiff in the specifications of the equipment, etc. In any event, the delay of 10 weeks was condoned by making full payment and the claim was an afterthought. So also the claim for retention money is equally not sustainable as the same is due to the defendants towards sale consideration. Therefore the court below erred in decreeing the suit



in respect of retention money also. There was no pleading and evidence that the plaintiff is not liable to return the said 10% retention money after the period of six months. There was no complaint from the plaintiff regarding the quality and performance of the equipment and therefore the claim itself is an afterthought and is without any legal basis. The court below also erred in awarding interest at 12% p.a.

10. In the above circumstances, the following points arise for consideration:-

(1) whether the appellants/defendants are liable to repay the 10% the equipment cost at the time of receiving I.D.B.I. documents from the first respondent/plaintiff as per the terms of the contract?

(2) Whether the first respondent/plaintiff is entitled for recovery of 10% of the equipment cost referred supra even after six months from handing over and commissioning of the furnace as per the terms of the contract?

(3) Whether the appellants/defendants are liable to pay penalty calculated at 0.5% of the equipment cost for the alleged delay of 23 weeks in supplying the equipment and liable to pay a sum of Rs.21,505/- as prayed by the first respondent/plaintiff?

(4) To what relief the parties are entitled to in this appeal?

11. Admittedly, the first respondent (hereinafter referred to as the plaintiff) placed an order with the appellants (hereinafter referred to as the defendants) for the supply, erection and commissioning of one Rotating and Tilting type Electrically Heated carbonitriding Furnace as per the terms and conditions in the purchase order, Ex.A-1 dated 18.3.1982 and the defendants accepted the same under Ex.A-2, letter of acceptance dated 20.3.1982. Hence the parties to the proceedings are bound by the terms and conditions contained in Ex.A-1 until the contrary is shown and proved.

12. It is not in controversy that the defendants agreed to supply the equipment at the cost of Rs.1,87,000/- Ex-factory of the plaintiff on or before 9.7.1982 and also received 20% of the said amount as advance on furnishing necessary indemnity bond. The admitted case of both the parties is that the equipment was erected and commissioned by the defendant on 15.12.1982 and that since then, the same is functioning to the satisfaction of the plaintiff's management. In this context, it is appropriate to extract the relevant clauses in Ex.A-1 to dispose of the appeal as under:-



"6.1 Schedule of payment:

- (i) 20% advance upon submission of guarantee from one of the nationalised general insurance companies.
- (ii) 80% against I.D.B.I. bill rediscounting scheme (5 years). Suppliers shall repay 10% of the equipment cost at the time of receiving IDBI documents from M/s.T.I. Cycles of India.
- (iii) 10% six months after successful commissioning of the furnace and handing over the same to T.I. Cycles of India.

7.0 Delivery:

Complete plant and equipment will be supplied within 16 weeks from the date of placement of the order. A period of 2 weeks will be allowed for erection and commissioning of the furnace.

8.0 Penalty/Bonus:

Penalty/Bonus amount calculated at 0.5% of order value will be levied/paid for each weeks delay/advance supply of the equipment."

13. It is no doubt true that when 80% of the cost of the equipment was paid by the plaintiff to the defendants immediately after commissioning of the furnace (vide) Ex.B-1 minutes of the joint meeting held by both the plaintiff and the defendants on 14.12.1982, it is stated therein that the clearance was issued without insisting on any retention money and the I.D.B.I. documents have been delivered to the defendants and therefore there is no dispute that on 18.4.1983 when the suit was laid for recovery of the said 10% retention money from the defendants more than four months lapsed from the date of commissioning of the furnace. In the above circumstances, the learned counsel for the defendants has pointed out the evidence of P.W.1 who was examined on 16.11.1989 to the effect that the furnace was functioning satisfactorily till date and therefore he has pointed out clause 6(1)(iii) of Ex.A-1 in support of his contention that the said retention money of 10% of the cost of the equipment even if retained by the plaintiff, the same ought to have been paid to the defendants after expiry of six months from the successful commission of the furnace. Hence, he has urged that in any view of the matter, whether the said 10% of the equipment cost paid by the plaintiff to the defendants along with I.D.B.I. documents was handed over or not, the time fixed for return of the amount to the defendants already lapsed and that it follows necessarily that the suit in respect of that claim of 10% of the equipment cost as of now is not maintainable even in accordance with the terms of the contract.

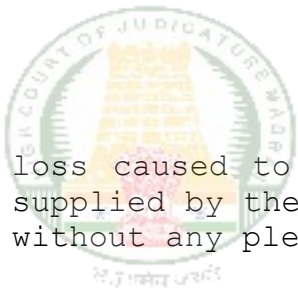


14. Though the learned counsel for the plaintiff has interpreted the said clause in Ex.A-1 relating to retention of 10% of the cost of the equipment as if the said amount had to be deducted by the plaintiff out of the total consideration for the supply of furnace by the defendants, this Court is unable to read between the lines so as to accept his interpretation of the terms of the contract. In any event, total equipment cost of 100% must necessarily be paid by the plaintiff to the defendants and if the said clause under the caption "schedule of payment" referred supra are taken into consideration in such perspective, one would come to the irresistible conclusion that the defendants rightly received the said 100% payment of cost of the equipment as per the terms of the contract.

15. Learned counsel for the plaintiff has placed reliance on Section 72 of the Indian Contract Act and the decision K.M.P.R. FIRM v. OFFICIAL ASSIGNEE OF MADRAS (1922 (16) L.W. 75) in support of his further contention that since the said 10% retention money was not received by the plaintiff from the defendants by inadvertence, the defendants are liable to pay the same to the plaintiff. However since on appreciation of the facts and circumstances of the case in the light of the evidence adduced on either side, this Court has held above that the defendants are entitled to retain the said amount of 10% of the equipment cost after six months from the date of commissioning the plant and equipment (i.e.,) 15.12.1982, the said provision of law and the ratio laid down in the decision referred supra do not loom large in this case.

16. Hence, this Court finds no reason to accept the interpretation put forth by the learned counsel for the plaintiff in this regard. It is therefore under such circumstances that the finding rendered by the court below in this context has to be set aside and the plaintiff is held not entitled to retain 10% of the cost of the equipment beyond six months from the date of erection and commissioning of the furnace.

17. Though the learned counsel for the plaintiff has made a feeble attempt to convince this Court that the plaintiff incurred loss due to the defect in the equipment supplied by the defendants and that on account of rectification of such defect, the plaintiff had incurred loss of Rs.3,820/- (vide) Ex.A-24 letter dated 16.5.1983 written by the plaintiff to the defendants, such contention also falls to the ground in view of the fact that the said letter was issued by the plaintiff long after the filing of the suit on 18.4.1983. Therefore this Court agrees with the argument put forth by the learned counsel for the defendants that since Ex.A-24 is an after-thought action contemplated by the plaintiff, the same is liable to be rejected. Furthermore, the plaintiff has not made any specific claim in the plaint with reference to any liquidated damages towards the alleged



loss caused to the plaintiff by reason of any defect in the furnace supplied by the defendants and therefore such contention now put forth without any pleadings or evidence to that effect cannot be sustained.

18. Regarding the claim of penalty towards the delay in the supply of the equipment, learned counsel for the plaintiff has pointed out that even though it was specifically agreed by the defendants to supply the equipment by not later than 9.7.1982 as per the delivery schedule in Ex.A-1, purchase order and also accepted by them (vide) Ex.A-2 letter of acceptance, the equipment was supplied only on 15.12.1982 and therefore he has urged that the court below was correct in rendering the finding that the plaintiff has proved the claim in that regard. But on the contrary, learned counsel for the defendants has drawn the attention of this Court to various correspondence between the parties under Exs.A-6 to A-15, and A-17 to A-23 in support of his contention that the delay was caused on account of the subsequent alteration made by the plaintiff in the manufacture of the equipment and that therefore the defendants are not liable for the suit claim towards penalty for any delay in the supply of the equipment.

19. Per contra, learned counsel for the plaintiff has drawn the attention of this court to the specific terms of the contract under clauses 1 to 4 and contended that unless it is shown that such terms of contract had been varied by any subsequent agreement between the parties, the defendants are bound by the original terms under Ex.A-1. Further according to him if the correspondence between the parties are perused carefully, it would be seen that the plaintiff made repeated requests to expedite the supply of the equipment and nowhere the terms of the original contract had been varied so as to extend the time for supply of the furnace on the part of the defendants.

20. A careful perusal of the said communication between the parties would undoubtedly indicate that the plaintiff had not accepted the schedule regarding delivery of the equipment by the defendants. But, on the other hand, it is evident therefrom that the plaintiff has been insisting upon supply of the equipment at the earliest as per the terms of the contract. It is relevant to note that D.W.1, partner of the first defendant-firm has candidly admitted in the cross-examination that the purchase order under Ex.A-1 has been accepted in toto and that nowhere 'Force Majeure' like labour unrest had been mentioned in Ex.A-1 as a reasonable cause for the delayed supply of the equipment and that as per the terms of the contract the equipment should be supplied with 'Retort', a component attached to the furnace. He would further admit that the parties did not agree for supply of the equipment without 'Retort' and therefore on the basis of the evidence on record, learned counsel for the plaintiff has argued and in my opinion rightly that the time for the performance of the contract under Ex.A-1 was not extended by mutual agreement between the



parties. In any view of the matter, the defendants have failed to convince the court below that the delay had been caused on account of the lapse on the part of the plaintiff and that the same was not due to the defendants.

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21. Since neither of the parties to the contract altered the terms of the same nor dispensed with the performance of the promise, I am unable to concede with the contention put forth by the learned counsel for the defendants that under the provisions of Sections 62 and 63 of the Indian Contract Act, they are not liable to pay the penal amount as per Ex.A-1. In any view of the matter, this Court has no option except to confirm the finding rendered by the court below on this aspect of the matter.

22. Further as has been rightly argued by the learned counsel for the plaintiff, in view of the provision under Section 55 of the Indian Contract Act, 1872, on account of the failure on the part of the defendants to perform their part of the contract within the time fixed in the contract under Ex.A-1, they are liable to pay the penalty as referred to above.

23. In view of the factual aspects of the matter as discerned from the evidence of the case, this Court is of the considered view that the defendants are bound by the terms of the contract under Ex.A-1 that they should supply the equipment within 16 weeks from the date of placement of the order under Ex.A-1 and that a period of two weeks would be allowed for erection and commission of the furnace. Since the said delay of 23 weeks had occurred in the supply, erection and commission of the equipment, they are also bound to pay the penalty as per clause 8 under Ex.A-1 at the rate of 0.5% of the order value (i.e.) Rs.21,505/- with subsequent interest at 12% p.a. with proportionate costs of the suit.

24. For the reasons aforesaid, the appeal is partly allowed. The impugned judgment and decree are set aside with reference to Rs.18,700/- with proportionate interest at the rate of 12% p.a. and costs and in other respects, the same are sustained. However, the parties are directed to bear their respective costs in this appeal.

dpp

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar



To

1. The VII Assistant Judge, City Civil Court, Chennai 104.
 2. The Registrar, City Civil Court, Chennai.104.
 3. The Section Officer, V.R.Section, High Court, Madras.
- + 1 cc to Mr.S. Thangasivan, Advocate SR No.20058

Judgment
in
A.S. No.60 of 1992

SSV(CO)
SR/23.5.2006